

**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

ELMAR K. SCOTT,

Petitioner,

v.

COVELLO,

Respondent.

Case No. 1:20-cv-01297-AWI-EPG-HC

FINDINGS AND RECOMMENDATION TO  
DISMISS PETITION FOR WRIT OF  
HABEAS CORPUS

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In the instant petition, Petitioner challenges his 2010 Stanislaus County Superior Court convictions. As Petitioner has sought federal habeas relief with respect to the challenged convictions previously, the undersigned recommends that the petition be dismissed pursuant to 28 U.S.C. § 2244(b) as an unauthorized successive petition.

**I.**

**DISCUSSION**

Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a habeas petition and allows a district court to dismiss a petition before the respondent is ordered to file a response, if it “plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” A federal court must dismiss a second or successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The

1 court must also dismiss a second or successive petition raising a new ground unless the petitioner  
2 can show that (1) the claim rests on a new, retroactive, constitutional right, or (2) the factual  
3 basis of the claim was not previously discoverable through due diligence, and these new facts  
4 establish by clear and convincing evidence that but for the constitutional error, no reasonable  
5 factfinder would have found the applicant guilty of the underlying offense. 28 U.S.C.  
6 § 2244(b)(2)(A)–(B). However, it is not the district court that decides whether a second or  
7 successive petition meets these requirements.

8 Section 2244(b)(3)(A) provides: “Before a second or successive application permitted by  
9 this section is filed in the district court, the applicant shall move in the appropriate court of  
10 appeals for an order authorizing the district court to consider the application.” In other words, a  
11 petitioner must obtain leave from the Ninth Circuit before he can file a second or successive  
12 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656–57 (1996). This Court must  
13 dismiss any second or successive petition unless the Court of Appeals has given a petitioner  
14 leave to file the petition because a district court lacks subject-matter jurisdiction over a second or  
15 successive petition. Burton v. Stewart, 549 U.S. 147, 157 (2007).

16 In the instant petition, Petitioner challenges his 2010 Stanislaus County Superior Court  
17 convictions for which he was sentenced to an imprisonment term of thirty-one years and four  
18 months. (ECF No. 1 at 1).<sup>1</sup> Petitioner previously sought federal habeas relief in this Court with  
19 respect to the same convictions. The petition was denied on the merits. See Scott v. Swarthout,  
20 No. 1:13-cv-01804-LJO-SMS.<sup>2</sup> Therefore, the Court finds that the instant petition is “second or  
21 successive” under 28 U.S.C. § 2244(b).

22 As Petitioner has already filed a federal petition for writ of habeas corpus regarding his  
23 2010 convictions, he cannot file another petition in this Court regarding the same convictions  
24 without first obtaining permission from the United States Court of Appeals for the Ninth Circuit.  
25 Here, Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to file  
26 his successive petition. Therefore, this Court has no jurisdiction to consider Petitioner’s renewed

27 <sup>1</sup> Page numbers refer to the ECF page numbers stamped at the top of the page.

28 <sup>2</sup> The Court may take judicial notice of its own records in other cases. United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

1 application for relief under 28 U.S.C. § 2254 and must dismiss the petition. See Burton, 549 U.S.  
2 at 157.

3 **II.**

4 **RECOMMENDATION**

5 Accordingly, the undersigned HEREBY RECOMMENDS that the petition for writ of  
6 habeas corpus be DISMISSED.

7 This Findings and Recommendation is submitted to the assigned United States District  
8 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
9 Rules of Practice for the United States District Court, Eastern District of California. Within  
10 **THIRTY (30) days** after service of the Findings and Recommendation, Petitioner may file  
11 written objections with the court and serve a copy on all parties. Such a document should be  
12 captioned "Objections to Magistrate Judge's Findings and Recommendation." The assigned  
13 United States District Court Judge will then review the Magistrate Judge's ruling pursuant to 28  
14 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified  
15 time may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d  
16 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

17 IT IS SO ORDERED.  
18

19 Dated: **October 6, 2020**

20 /s/ Eric P. Grogan  
UNITED STATES MAGISTRATE JUDGE